No. 9194

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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In the Matter of
ADRIEN BLANQUIE,
doing business as City of Paris Dyeing & Cleaning Works,
Bankrupt.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Adrien Blanquie, doing business as City of Paris Dyeing & Cleaning Works, Bankrupt,
Appellant,

vs.

M. DUCASSE,
Appellee.

APPELLANT'S REPLY TO APPELLEE'S POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO DISMISS APPEAL.

CLOSING BRIEF OF APPELLANT.

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APPELLANT'S REPLY TO APPELLEE'S POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO DISMISS APPEAL.

The above named appellee has moved to dismiss the appeal of the Trustee in Bankruptcy from the Order of the District Court (Tr. 41) upon the ground that the same is an Interlocutory Order made in a controversy arising in proceedings in bankruptcy and is therefore not an Order from which an appeal lies.

The Order of the District Court was made in a controversy arising in a bankruptcy proceeding but this Order has a definite degree of finality and is not of an interlocutory nature in any sense of the word. This Order resulted from the filing of a Petition to review an Order of the Referee in Bankruptcy adjudging the sum of $427.57 as the balance owing the appellee under a Conditional Sale Contract and the Referee's Order fixing the amount due is predicated upon the same amount appearing in the appellee's books of account as owing by the bankrupt to him. The Petition to review the Referee's Order (Tr. 39) specifically states that the Referee's Order is contrary to law for failure of the Referee to allow the appellee to explain entries in his books of account for the purpose of showing a larger amount due. The Order of the District Court referring the matter to the Referee to determine the amount due is a final Order in that the Referee is directed to receive the oral evidence which the appellee heretofore attempted to offer and then determine the amount owing. This Order of the District Court is therefore a final Order concerning the admissibility of oral evidence to explain the books of account of the appellee. Being a final Order and not an Interlocutory Order it is appealable under the provisions of Section 24a of the Bankruptcy Act as amended in 1938. This Order of the District Court therefore reverses the ruling of the Referee in Bankruptcy regarding the admissibility of oral evidence and is a final Order binding on the Bankruptcy Court in case this matter is returned to it for further hearing.

Even, however, if it may be assumed for the purpose of argument that the District Court Order is an Interlocutory Order, nevertheless there is no distinction between Interlocutory and final Orders since the above mentioned Section of the Bankruptcy Act was amended in 1938. The appellee on pages 7 and 8 of his Brief has cited Section 24a as amended and for the purposes of comparison and noting the change in the language of Section 24a prior to its amendment, we submit the following:

> "Jurisdiction of Appellate Courts.—a. The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction *in other cases.*" (Italics ours.)

A comparison of the above quoted Section 24a prior to its amendment in 1938 will disclose a change in the verbal arrangement of the section. Prior to commenting upon the elimination of the above italicized words, "in other cases" we desire to comment upon the proviso at the end of the amended Section 24a, which provides that *any* order, decree or judgment involving less than $500.00 may be appealed only upon allowance by the Appellate Court. This proviso clearly indicates an intention to eliminate any distinction between appeals in "proceedings" and in "controversies". In other words *any* Order involv-

ing an amount in excess of $500.00 is an appealable Order and this Court in the pending matter by its decision rendered on June 3, 1939, (104 Fed. (2d) 760) determined that an amount in excess of $500.00 was involved.

Counsel for the appellee has cited Section 129 of the Judicial Code on page 9 of his Brief in support of his contention that Interlocutory Orders can be appealed if an appeal generally is allowed from an Interlocutory Order. In other words, it is his contention that the Appellate jurisdiction of this Court is prescribed by Section 128 and the above mentioned Section of the Judicial Code. Prior to the amendment of 1938 of Section 24a of the Bankruptcy Act these two Sections were given consideration by the Circuit Courts of Appeal in determining the right to appeal Final and Interlocutory Orders of the District Court. The reason the Courts took cognizance of these two Sections was due to the italicized language "in other cases" found in the reference to Section 24a of the Bankruptcy Act prior to its amendment. It is to be noted that this italicized language has been omitted from Section 24a as amended in 1938 so that there is no longer any distinction whatsoever between the right to appeal Final or Interlocutory Orders of a District Court.

Prior to the 1938 amendment of Section 24a of the Bankruptcy Act, this Court held that its jurisdiction to entertain an appeal from an Order made in a controversy in bankruptcy was prescribed by Sections 128 and 129 of the Judicial Code and predicated its appellate jurisdiction upon the italicized words above mentioned, "in other cases". In *Bank of America*

National Trust & Savings Association v. Cuccia, (C. C. A. 9) 93 F. (2d) 754, an appeal was taken from Orders of the District Court made in a proceeding in Bankruptcy which this Court held were non-appealable Orders under Section 24a. In discussing its jurisdiction in connection with such Orders had the same been made in a controversy in bankruptcy, this Court speaking through Judge Mathews, said on page 758:

> "Even though it were held that these were orders made in a controversy arising in bankruptcy, they still would not be appealable under Section 24 (a). That section does not authorize appeals from all orders made in controversies arising in bankruptcy, but only from such orders as would be appealable if made "in other cases"; that is to say, in cases other than bankruptcy cases. Moody & Son v. Century Savings Bank, 239 U. S. 374, 377, 36 Am. B. R. 95, 36 S. Ct. 111, 60 L. Ed. 336; Childs v. Ultramares Corp. (C. C. A., 2nd Cir.), 16 Am. B. R. (N. S.) 113, 40 F (2d) 474, 478. *Our jurisdiction in other cases is prescribed by sections 128 and 129 of the Judicial Code, as amended, 28 U. S. C. A., Sec. 225, 227.* Section 128 empowers us to review by appeal final decisions of the District Courts not directly reviewable by the Supreme Court. There was no final decision in this case." (Italics ours.)

It is therefore evident that due to the 1938 amendment of Section 24a of the Bankruptcy Act eliminating the language, "in other cases" jurisdiction of this Court is no longer prescribed by Sections 128 and 129 of the Judicial Code. There is no longer any distinction between the right to appeal Interlocutory or Final Orders in controversies in bankruptcy and the

only limitation placed on the right to appeal is in connection with any order, decree or judgment less than $500.00.

The Trustee therefore submits that a final order was made by the District Court from which he has taken an appeal. This Order reverses the ruling of the Referee in Bankruptcy sustaining an objection to the introduction of oral testimony and by ordering the matter re-referred to the Referee in Bankruptcy directs him to admit the oral evidence to explain and contradict books of account which he prohibited the appellee from introducing. As above stated, even assuming for the purpose of argument that the Order of the District Court is an Interlocutory Order, by virtue of the amendment of Section 24a of the Bankruptcy Act eliminating the language "in other cases" there is no longer any limitation upon the Circuit Court to entertain appeals from all orders in controversies in bankruptcy. The cases cited by the appellee in support of his motion to dismiss the appeal construe Section 24a of the Bankruptcy Act prior to its 1938 amendment and are not in point.

It is therefore respectfully submitted that the motion of the appellee to dismiss the appeal of the Trustee should be denied.

Dated, San Francisco,
September 25, 1939.

GRANT H. WREN,
Attorney for Trustee.

JAMES M. CONNERS,
Of Counsel.

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Appellee.

CLOSING BRIEF OF APPELLANT.

Counsel for the appellee refers to two exceptions taken by him to the statement of the case by appellant. Although the Transcript discloses that counsel for the appellee during the hearing before the Referee in Bankruptcy attempted to explain the book entries by oral testimony it is evident that such explanation

would materially "vary" his own books of account by increasing the balance owing from $427.57 to $2273.83. Had the Referee permitted him to introduce such oral testimony he would have "contradicted" his own books of account by a very substantial amount. The other exception taken by him to the statement of the case concerns certain language referring to the erroneous ruling of the District Court. We submit that there is no error in so referring to the District Court Order in view of the fact that the error of the District Court reversing the Order of the Referee in Bankruptcy is the ground upon which the appellant predicates the pending appeal.

I.

BOOKS OF ACCOUNT ARE THE BEST EVIDENCE.

The appellee concedes the elementary rule of evidence that books of account are the best evidence of what they contain and contends that he was entitled to introduce parol evidence to explain his books of account when the transaction is the matter in controversy. In support of this contention he quotes from paragraphs 767 and 768 of Volume 2 of Jones Commentaries on Evidence and several California Appellate and Supreme Court cases.

If the effect of the oral testimony which the appellee attempted to introduce before the Referee in Bankruptcy would have established a balance of $427.57 as the amount owing by the bankrupt, which sum also appeared in the books of account of the appellee, then such parol evidence was admissible regardless of the ledger sheets of the appellee. Such a

conclusion is drawn from the paragraphs from Jones Commentaries on Evidence cited by the appellee on pages 14 and 15 of his Brief. Under such circumstances we have an exception to the best evidence rule due to the fact that no attempt is made by the introduction of oral evidence to prove the contents of an account book. However, in the pending matter the oral testimony was not offered for the purpose of proving that the contents of his ledger showed a balance of $427.57 but that a sum approximately $1850.00 in excess of this amount is the balance due him by the bankrupt. It cannot, therefore, be said that the oral testimony is on the same plane with the books of account and such oral testimony, if its introduction had been permitted by the Referee in Bankruptcy, would clearly have varied and contradicted the appellee's own books.

The case of *Maguire v. Cunningham,* 64 Cal. App. 536, is first cited by the appellee in support of his contention that books of account are not the best or sole evidence of transactions reflected in them. An examination of the quotation appearing on page 549 of this case discloses that the oral testimony of persons participating in events of which a record has been made in the books of account is considered to be on the same plane as entries appearing in the books. However, in the pending matter the testimony of the appellee's witnesses would contradict and vary the records in his books of account and under such circumstances the books of account are the best evidence.

A similar criticism can be made of the irrelevancy of the quotation from *Cowdery v. McChesney,* 124 Cal.

363. In this case the Court held that it is proper to prove items appearing in an account by oral testimony of persons having knowledge of the transactions to which the items relate. The Court did not hold that such items could be explained, contradicted or varied by oral testimony. Furthermore, the Court also held that if the items were the result of a written contract between the parties no oral testimony whatsoever was admissible. In the pending matter the items appearing in the appellee's books of account resulted from a Conditional Contract of Sale between him and the bankrupt (Tr. 5). Pursuant to the case thus cited by the appellee no oral testimony is admissible in the pending matter due to the fact that the items in the ledger sheet are the result of this Conditional Contract of Sale.

Counsel for the appellee has failed to quote in full his excerpt from *Argue v. Monte Regio Corp.*, 115 Cal. 575, appearing on page 17 of his Brief. His quoted language from the decision states that oral evidence of persons having personal knowledge of transactions is the best evidence of the items but he has failed to add to this quotation the following language of the Court, to-wit, "where they are not the result of a written contract, as they were not here." This case cites with approval the *Cowdery v. McChesney* case above mentioned and the same comment may be again made relating to oral evidence being only admissible if the transactions are not the result of a written contract. Both of these cases which appellee has cited may therefore be considered as an authority in support of the appellant.

A factual difference is clearly evident in *Bushnell v. Simpson,* 119 Cal. 659. The plaintiff was attempting to recover judgment for his salary as a corporate officer and offered in evidence his own record kept by him of debits and credits in connection therewith. This record in no way tended to vary or contradict the corporate boooks so as to favor the plaintiff and the Court held that his personal memorandum book was proper and material evidence for the purpose of fixing the amount to be deducted from the salary claimed by him. The Court further held that this book could have no weight in determining the amount of the salary which he was to receive prior to deducting the credits as his salary claim was based upon an express contract. The quotation cited by the appellee is merely dicta and has no bearing whatsoever upon the decision of the Court permitting the plaintiff to introduce his personal memorandum book.

Quotations from *Schurtz v. Kerkow,* 85 Cal. 277, and *Bailey v. Hoffman,* 99 Cal. App. 347, were also cited by the appellee. An examination of the facts in the former case discloses that the books and records were introduced in an action to recover one-half of the net profits of a business managed by the plaintiff. The Court held that any witness knowing anything about book entries should have been permitted to testify only in so far as knowledge of the witness related to the source of profits or transactions out of which the same arose. Such testimony, however, was not admitted for the purpose of varying, explaining or contradicting items appearing in the books

and the factual difference between this case and the pending matter is clearly apparent. In the latter case above mentioned it appears that the Court admitted testimony regarding circumstances relating to the matter upon which the item in the account was based. However, such testimony only had reference to facts leading up to the account and did not involve any oral testimony which would vary or change the account.

The Appellant Trustee respectfully submits that the authorities cited by the appellee in no way support his right to prove the balance owing him by the bankrupt by oral testimony. Such oral testimony is not on the same plane as the books of account in view of the fact that the testimony offered by the appellee will vary and contradict his own ledger. His own books are clearly the best evidence of the balance due and this Circuit has held in the *Pabst Brewing Co.* case and the *Schreve* case cited on pages 6 and 7 of the appellant's Opening Brief that books of account are the primary and best evidence of their contents. In the pending matter the sum of $427.57 appears in the appellee's books as the balance owing him by the bankrupt and hence his own ledger is the primary and best evidence of the indebtedness of the bankrupt to the appellee. Any oral testimony to explain, vary or contradict this amount so as to increase the balance owing by the sum of $1850.00 is clearly inadmissible.

II.

APPELLEE'S BOOKS AND RECORDS ARE ADMISSIONS AGAINST HIS INTEREST.

The appellee concedes that his own books and records are admissions against his own interest. This principle of law clearly inures to the benefit of appellant on this appeal. If the appellee is permitted to introduce oral testimony contradicting and varying his own books of account such evidence would permit the appellee to set aside this principle of the law of evidence of admissions against interest whenever an occasion arose to overcome such admissions against interest. Such an occasion is present in the pending matter, wherein the appellee seeks to overcome his admission of $427.57 owing to him by the bankrupt, as shown in the appellee's ledger, by attempting to substantially increase this amount by oral testimony.

III.

DEDUCTION FOR INCOME TAX PURPOSES NOT JUSTIFIED.

The appellee questions the propriety of any reference being made in the appellant's Opening Brief to the reduction of the contract balance for income tax purposes. This question is not a collateral matter but affects the point at issue. In fact the subject of income tax deductions was injected into the proceeding by counsel for the appellee during the hear-

ing before the Referee in Bankruptcy. (Tr. 26 and 27). The appellant relying upon his argument and authorities cited in his Opening Brief (pages 17 to 22 inclusive) submits that the appellee is estopped to change the amount of the contract balance appearing in his ledger. Whether the properly constituted authorities may hereafter take steps to correct any unjustified deductions is a matter that is in no way concerned with this appeal.

CONCLUSION.

It is therefore respectfully submitted that the Order of the District Court should be reversed. This Order overrules the ruling of the Referee in Bankruptcy refusing to permit the introduction of oral testimony to explain, vary or contradict the ledger sheet of the appellee. The entries were made by the appellee based upon debits and credits arising out of a Conditional Contract of Sale and oral evidence cannot be introduced to vary or contradict an account unless there is an absence of a written contract between the parties. This Court has held in two decisions that books of account are the primary and best evidence of transactions between parties and the appellee admits the principle of the law that his books and records are admissions against his own interest. His own ledger sheets must speak for themselves without the benefit of oral testimony to explain them in any way.

Wherefore, appellant prays that the Order of the District Court be reversed with costs to appellant.

Dated, San Francisco,
September 25, 1939.

Respectfully submitted,
GRANT H. WREN,
Attorney for Appellant.

JAMES M. CONNERS,
Of Counsel.